MOTION FILED
MAY 26 1981

No. 80-518

IN THE

Supreme Court of the United States

October Term, 1980

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC., ET AL.

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF FOR AMERICAN INSURANCE ASSOCIATION AS AMICUS CURIAE

JOHN C. DUNCAN, III
Suite 1010
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorney for American Insurance Association

WILLIAM P. DALE
KURT C. ROMMEL
Suite 1010
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-518

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC., ET AL.

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

---

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

TO: The Supreme Court of the United States.

American Insurance Association respectfully moves for an order granting leave to file an amicus curiae brief in the above-entitled case pursuant to Rule 42 of the Revised Rules of this Court. Consents of the attorneys for the petitioner and the Federal respondent have been received. Consent of the respondent Riley has been refused.

The movant, American Insurance Association (AIA), is an unincorporated trade association of 150 property and casualty insurers. Its members represent a large percentage of the pro-

perty and casualty industry, particularly in the area of workers' compensation. The most recent figures available demonstrate that in 1979, AIA member companies wrote over $6 billion in direct workers' compensation premiums nationwide, including Longshoremen's and Harbor Workers' Compensation Act (Longshore) coverage, accounting for nearly 43% of the market for this type of insurance. While specific figures are not available, it is estimated that approximately the same percentage of Longshore coverage is written by AIA companies.

The AIA and its member companies are deeply concerned that the ruling of the District of Columbia Circuit Court of Appeals in *Riley* will place enormous stress upon an already over-burdened workers' compensation system. Even prior to the Court's decision in this case, insurers have had great difficulty in adequately pricing Longshore risks due to the fact that the benefits payable under that Act are far greater and far more certain than those payable under any state compensation system.

It is the view of the AIA and its members that the practical effect of the *Riley* holding will be to make virtually all medical ailments compensable, regardless of their origin, unless employers or their insurers can come forward with substantial evidence to rebut the presumption of causality. The AIA, as amicus curiae, seeks to assist the Court by presenting a discussion of the proper role of the statutory presumption found in 33 U.S.C. § 920(a) and the ramifications of the Court of Appeals ruling on the administration of the Act.

Petitioner and respondents are expected to primarily emphasize the merits of the Court of Appeals decision vis-a-vis the facts of the instant case and their clients' respective interests while discussing only peripherally the administrative implications of the Court's ruling, with even less attention being devoted to the historical background and role of the applicable statutory presumption. These issues, of utmost importance to the business community and insurance industry, will not adequately be presented by the parties, and thus it is for this reason

that the AIA moves this Court for leave to file the attached amicus curiae brief.

The attached amicus curiae brief of the American Insurance Association discusses both historically and legislatively the purpose for which the presumption in 33 U.S.C. § 920(a) was enacted. The roots of this section and the precedential decisions from the New York State courts, from whence the presumption came, are traced, and the legislative history leading to the passage of the Longshore Act are articulated for this Court's edification.

The brief then summarizes the departures from this purpose by nearly every Federal circuit, culminating in the District of Columbia Circuit's even further unwarranted expansion in the case under review. Finally, the brief discusses the potentially devastating impact it would have upon the administration of the Longshore Act and the business/insurance industry.

For the foregoing reasons, this motion for leave to file a brief as amicus curiae should be granted.

Dated: May 26, 1981

JOHN C. DUNCAN, III
Suite 1010
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
202/872-8411

WILLIAM P. DALE
KURT C. ROMMEL
Suite 1010
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

INDEX

Page

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF i

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I PURPOSE AND SCOPE OF THE PRESUMPTION FOUND IN 33 U.S.C. § 920(a) 3

II CONFLICT WITH DECISIONS FROM OTHER FEDERAL CIRCUITS 13

III EXPANSION OF THE § 20(a) PRESUMPTION WOULD ADVERSELY AFFECT THE ORDERLY ADMINISTRATION OF THE ACT 19

CONCLUSION 27

APPENDIX A a1

APPENDIX B a4

TABLE OF AUTHORITIES

Cases: Page

Avondale Shipyards, Inc. v. Vinson, 623 F.2d 1117, (5th Cir. 1980) 19

Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U.S. 408 (1932) 19

Beasley v. O'Hearne, 250 F.Supp. 49 (D.Va. 1966) 14

Butler v. District Parking Management Co., 124 U.S. App. D.C. 195, 363 F.2d 682 (1966) 16, 17

Page

Calbeck v. Strachan Shipping Co.,
306 F.2d 693 (5th Cir. 1962), *cert. denied*,
372 U.S. 954 (1963) 15

Cardillo v. Liberty Mutual Insurance Co.,
330 U.S. 469 (1947) 11

Collins v. Brooklyn Union Gas Co.,
171 A.D. 381, 156 N.Y.S. 957 (1916) 4, 6

Continental Insurance Co. v. Byrne,
471 F.2d 257 (7th Cir. 1972), *cert. denied*,
406 U.S. 918 (1972) 15

Davis v. Department of Labor of Washington,
317 U.S. 249 (1942) 10, 11

Eldridge v. Endicott Johnson & Co.,
228 N.Y. 21, 126 N.E. 254 (1920) 4, 6, 7

Eller & Co. v. Golden,
620 F.2d 71 (5th Cir. 1980) 15

Eschbach v. Contractors, Pacific Naval Airbases,
181 F.2d 860 (7th Cir. 1950) 15

Fish v. Rutland R. Co.,
189 A.D. 352, 178 N.Y.S. 439 (1919) 4

Friend v. Britton,
220 F.2d 820 (D.C. Cir.), *cert. denied*,
350 U.S. 836 (1955) 19

Furlong v. O'Hearne,
144 F.Supp. 266 (D.Md. 1956), *aff'd.*,
240 F.2d 958 (4th Cir. 1957) 14

Gooding v. Willard,
209 F.2d 913 (2d Cir. 1954) 14

Great American Indemnity Co. v. Britton,
86 U.S. App. D.C. 44, 179 F.2d 60 (1949) 19

Page

Greenberg v. Greenberg,
203 A.D. 343, 196 N.Y.S. 626 (1922) 8

Hartford Acciddent & Indemnity Co. v. Cardillo
72 U.S. App. D.C. 52 (1940), *cert. denied,*
310 U.S. 649 (1940) 16

Hensley v. Washington Metropolitan Area Transit Authority,
___ U.S. App. D.C. ___, ___ F.2d ___
(D.C. Cir. No. 79-2552, March 17, 1981)..... 20

Hoage v. Employers Liability Assurance Corp.,
62 U.S. App. D.C. 77, 64 F.2d 715 (1953),
cert. denied 290 U.S. 637 (1934) 19

Hunigman v. Sun Shipbuilding and Dry Dock Co.,
8 BRBS 141, (1978) 23

In re Rheinwald,
168 A.D. 425, 153 N.Y.S. 598 (1915) 4

Intercounty Const. Corp. v. Walter,
422 U.S. 1 (1975) 19

John W. McGrath Corp. v. Hughes,
264 F.2d 314 (2d Cir. 1959), *cert. denied,*
360 U.S. 931 (1959) 13

Joseph v. United Kimono Co.,
194 A.D. 568, 185 N.Y.S. 700 (1921) 7

J.V. Vozzolo, Inc. v. Britton,
126 U.S. App. D.C. 259, 377 F.2d 144 (1967) 16

Kingsley v. Donovan,
169 A.D. 828, 155 N.Y.S. 801 (1915) 4

Knickerbocker Ice Co. v. Stewart,
253 U.S. 149 (1920) 9

Liberty Mutual Ins. Co. v. Gray,
137 F.2d 926 (9th Cir. 1943) 16

Page

Lorchitsky v. Gotham Folding Box Co.,
230 N.Y. 8, 128 N.E. 899 (1920) 7

Marra Brothers v. Cardillo,
154 F.2d 357 (3d Cir. 1946) 14

Matter of Hanson v. Turner Construction Co.,
224 N.Y. 331, 120 N.E. 118 (1918) 5

McHale v. Sheffield Farms Co.,
193 A.D. 541, 184 N.Y.S. 576 (1920) 6

Mitchell v. Woodworth,
146 U.S. App. D.C. 21, 449 F.2d 1097 (1971) 16, 17

Nardi v. Willard,
156 F.Supp. 425 (D.N.Y. 1957) 13

Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP
583 F.2d 1273 (4th Cir. 1978),
cert. denied 440 U.S. 915 (1979) 14

Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP
592 F.2d 762 (4th Cir. 1979) 24

Northeast Marine Terminal Co. v. Caputo,
432 U.S. 249 (1977) 9

O'Keeffe v. Smith, Hinchman & Grylls Associates,
380 U.S. 359 (1965) 12, 19

Okrzsezs v. Lehigh Valley R. Co.,
170 A.D. 15, 155 N.Y.S. 919 (1915) 4

O'Leary v. Puget Sound Bridge & Dry Dock Co.,
349 F.2d 571 (9th Cir. 1965) 16

Overseas African Construction Corp. v. McMullen,
500 F.2d 1291 (2d Cir. 1974) 13

Page

Parsons Corp. v. Director, OWCP,
619 F.2d 38 (1980) 16

Pate Stevedoring Co. v. Henderson,
44 F.Supp. 12 (D.Ala. 1943) 15

Pillsbury v. Liberty Mutual Ins. Co.,
143 F.2d 807 (9th Cir. 1944) 16

Pinto v. Chelsea Fibermills,
196 A.D. 23, 186 N.Y.S. 748 (1921) 8

Powley v. Vivian & Co.,
169 A.D. 170, 154 N.Y.S. 426 (1915) 4

Ridgley v. Ceres, Inc.,
594 F.2d 1175 (8th Cir. 1979) 15

Riley v. US Industries/Federal Sheet Metal, Inc.
200 U.S. App. D.C. 402, 627, F.2d 455 (1980) 17

Robinson v. Bradshaw,
92 U.S. App. D.C. 216, 206 F.2d 435 (1953),
cert. denied, 346 U.S. 899 (1953) 16

Russo v. Jarvis Stores,
193 A.D. 587, 185 N.Y.S. 281 (1920) 7

Saccomanno v. Grase River R. Corp.
191 A.D. 761, 182 N.Y.S. 23, aff'd.,
229 N.Y. 625, 129 N.E. 934 (1920) 4

Smith v. H.J. Bartle Mfg. Corp.,
189 A.D. 426, 178 N.Y.S. 589, aff'd.,
228 N.Y. 564, 127 N.E. 922 (1919) 4

Southern Pacific Co. v. Jensen,
244 U.S. 205 (1917) 9

State of Washington v. W.C. Dawson & Co.,
264 U.S. 219 (1924) 9

Page

Swinton v. J. Frank Kelly, Inc.,
554 F.2d 1075 (D.C. Cir.), *cert. denied*,
429 U.S. 820 (1976) 16, 20

Sykes v. O'Hearne,
181 F.Supp. 368 (D.Md. 1960) 14

Terminal Shipping Co. v. Branham,
47 F.Supp. 561, aff'd.,
136 F.2d 655 (4th Cir. 1942) 3

Travelers Insurance Co. v. Cardillo
78 U.S. App. D.C. 255, 140 F.2d 10 (1943) 16

Turner v. Willard,
155 F.Supp. 352 (D.N.Y. 1956) 13

Voris v. Eikel,
346 U.S. 328 (1953) 19

Wheatley v. Adler,
132 U.S. App. D.C. 177, 407 F.2d 307 (1968) 16, 17

White v. American Society for Prevention of Cruelty,
191 A.D. 6, 180 N.Y.S. 867 (1920) 6

Wingfield v. New York Central & H.R.R. Co.,
168 A.D. 351, 153 N.Y.S. 499 (1915) 4

Wynn v. Kelley,
223 F.Supp. 875 (D.D.C.), aff'd.,
136 F.2d 655 (4th Cir. 1942) 3

Young & Co. v. Shea,
397 F.2d 185 (5th Cir. 1968), *cert. denied*,
395 U.S. 920 (1969) 15, 19, 23

Statutes: Page

5 U.S.C. § 556 23
33 U.S.C. § 912 ..... 19, 20
33 U.S.C. § 913 ..... 19, 20
33 U.S.C. § 919(c) 20
33 U.S.C. § 919(d) 20, 23
33 U.S.C. § 920(a) ..... ii, iii, 1, 3, 10-19, 22, 26, 27
33 U.S.C. § 928 ..... 21, 25
33 U.S.C. § 930 3-8

New York Workers' Compensation Law § 21 3-8

Miscellaneous:

Ahern, *The New Crackdown on Insurance Frauds,* 38 Journal of Insurance No. 4, kp. 26 (1977) 22

Compensation for Employees in Certain Maritime Employment: Hearings Before the Subcommittee of the Committee on the Judiciary, U.S. Senate 9

126 Congressional Record, February 7, 1980 ..... 23, 25

H.R. Rep. No. 1190, Rep. of Committee on Jud. H.R. 12063, May 13, 1926 9

Report, Committee on Housing and Economic Development on Bill 3-106, the District of Columbia Workers' Compensation Act of 1979, January 8, 1980 25

To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Employment: Hearings on S. 3170 Before the Committee on the Judiciary, House of Representatives, 69th Cong., 1st Sess 9

To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Employment: Hearings on H.R. 9498 Before the Committee on the Judiciary, 69th Cong., 1st Sess 9

Tomlinson, *Workers' Compensation — A License to Steal?,* 108 Readers Digest No. 654, p. 163 (1976) 22

Washington Post, March 9, 1980 22

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-518

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC., ET AL.

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

---

BRIEF FOR AMERICAN INSURANCE ASSOCIATION AS AMICUS CURIAE

SUMMARY OF ARGUMENT

The original purpose and scope of the presumption found in 33 U.S.C. § 920(a) is limited to the question of jurisdictional coverage under the Act. That provision was taken verbatim from the New York Workmen's Compensation Act, and at the time the Longshoremen's and Harbor Workers' Compensation Act (the Act) was passed in 1927, the New York courts had repeatedly construed the presumption to apply only to questions of jurisdictional coverage. Congress intended that role for the presumption when the statute was enacted. The

legislative history surrounding the passage of the Act, and the three cases in which this Honorable Court has considered the presumption all limit its application to jurisdictional coverage questions.

Despite this clear precedent, all federal appellate courts who have considered this statutory presumption, in varying degrees, appear to have extended its application to areas well beyond the issue of jurisdictional coverage. Prior to the present case, these presumption extensions had mainly been used to presume a nexus between a disabling condition manifesting itself during employment hours and the employment, or to presume a nexus between a subsequently manifested disabling condition and a previously proven employment-bred accident. The Court of Appeals decision in this case, which constitutes a major deviation from all previous extensions of the presumption, now simply allows a claimant to establish a medical infirmity, regardless of origin, and the burden then rests upon the employer to disprove that it was work-connected.

The unwarranted further expansion of the presumption embodied in the Court of Appeals decision will have a potentially disastrous effect, both cost-wise and administratively, on an already overburdened workers' compensation system. Prior to this case, the Act featured numerous safeguards designed to protect a claimant's interests, and these have been zealously guarded by the courts and administrative bodies dealing with the Act. These have proved more than ample to ensure proper recompense for meritorious claims, but with the Court of Appeals erasing the requirement of a worker having to show his ailment to be work-related, the filing and pursuit of questionable claims is encouraged with the ability to mount an effective defense virtually emasculated.

ARGUMENT

I

PURPOSE AND SCOPE OF THE PRESUMPTION FOUND IN 33 U.S.C. § 920(a)

The principal issue involved in the instant case has to do with the purpose, scope, and interpretation of the following provision of the Longshoremen's and Harbor Workers' Compensation Act (hereinafter Act) found in 33 U.S.C. § 920(a):

> "§ 920. *Presumptions*
>
> "In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed, in the absence of substantial evidence to the contrary -
>
> "(a) that the claim comes within the provisions of this chapter. . . . "

It has long been recognized by the various courts which have considered the effect of this presumption, and which is amply confirmed by the legislative hearings and history surrounding the passing of the Act, that the foregoing portion of the statute was taken verbatim from the New York Workmen's Compensation Act (New York Act). *Wynn v. Kelley,* 223 F.Supp. 875, *aff'd,* 120 U.S. App D.C. 13 (1963); *Terminal Shipping Co. v. Branham* 47 F.Supp 561, aff'd.136 F2d 655 (4th Cir 1942). It is, therefore, useful to consider how the foregoing presumption had been interpreted by the New York courts at the time the Act was passed in 1927.

When the relevant authorities are analyzed, it becomes abundantly clear that the presumption was included by the New York legislature in an effort to more readily bring injured workers within the jurisdiction and fundamental coverage of its Act rather than to relieve a claimant of the obligation of establishing that an accidental injury arising out of and in the course of employment had occurred. New York Workers Compensation Law § 21.

After the New York Act was passed, the jurisdictional presumption of coverage found in § 21 of the New York statute, was invoked to rebuff arguments that the injured worker was outside the Act's coverage because he had been injured while performing work which was alleged to be in interstate commerce [*Wingfield v. New York Central & H.R.R. Co.*, 168 A.D. 351, 153 N.Y.S. 499 (1915); *Okrzsezs v. Lehigh Valley R. Co.*, 170 A.D. 15, 155 N.Y.S. 919 (1915); *Fish v. Rutland R. Co.*, 189 A.D. 352, 178 N.Y.S. 439 (1919) *Saccomanno v. Grasse River R. Corp.*, 191 A.D. 761, 182 N.Y.S. 23, *aff'd.* 229 N.Y. 625, 129 N.E. 934 (1920)]; that the injured worker was an independent contractor rather than an employee within the intent of the Act [*In re Rheinwald*, 168 A.D. 425, 153 N.Y.S. 598 (1915); *Powley v. Vivian & Co.*, 169 A.D. 170, 154 N.Y.S. 426 (1915)]; that the injured worker was outside of the Act because he was performing duties away from the employer's premises *[Smith v. H.J. Bartle Mfg. Corp.*, 189 A.D. 426, 178 N.Y.S. 589, *aff'd* 228 N.Y. 564, 127 N.E. 922 (1919)]; and that the injured employee would not be within the Act because of the going and coming rule *[Kingsley v. Donovan*, 169 A.D. 828, 155 N.Y.S. 801 (1915)].

As the subject of the proper role and scope of § 21 of the New York Act was litigated, definitive pronouncements were articulated. In *Collins v. Brooklyn Union Gas Co.*, 171 A.D. 381, 156 N.Y.S. 957 (1916) [cited with approval by the New York Court of Appeals in *Eldridge v. Endicott Johnson & Co.*, 228 N.Y. 21, 126 N.E. 254 (1920)], a claimant's husband had died in a fall and death benefits were awarded. The appellate court, in reversing, noted that there was no evidence introduced to indicate that the decedent had stumbled or fallen, but there had merely been a showing of a sudden fainting during working hours causing a fall on hard pavement.

The Court observed:

> "It should, moreover, be said that the Deputy Commissioner incorrectly stated and applied the presumptions arising under § 21 of the Act. There is nothing

in § 21, or any other part of the Act, which relieves a claimant from producing evidence that the injuries arose 'out of and in the course of' an employment of the injured person by the employer against whom the claim is directed. Once that evidence of the employment, the injury in the course of it, the injury as a result of something arising from the employment, is submitted, the first presumption enumerated in § 21 carries presumption of the Commission's jurisdiction, the applicability of the statute, the 'hazardous' character of the employment proved, and the inclusion of the work being done by the injured person at the time of the injury within the scope of an 'employments' enumerated and defined as 'hazardous' (citations omitted), and the second, third, and fourth items of § 21 carry presumptions covering, in the absence of substantial evidence to the contrary, the other conditions precedent specified in § 10. The Commission is not authorized however, to make an award under the Act in the absence of at least some evidence that the employee met with an injury while he was at work for the specified employer and as a consequence of something that had a relation to the work of the employer, something done by him or by others while he was still employed. The Act does not undertake to make the employer an insurer of the life, health, or regular heart action, of an employee during the hours of labor, in the absence of proof that the injury was due, for example, to a fall caused by cardiac syncope arising from overexertion in the course of the employment."

In *Matter of Hanson v. Turner Construction Co.*, 224 N.Y. 331, 120 N.E. 118 (1918), the claimant collapsed and fell in an unwitnessed accident, and his death was found attributable to a blood clot and pressure on the brain. New York's highest court denied benefits, and in the course of its opinion stated as follows:

> "Under such circumstances, I do not see how an award could be made. If so, it had for its basis a mere guess or conjecture. The Workmen's Compensation Law should receive a liberal construction, but it ought not to be so construed to take money from one person and give it to another without any legislative basis therefor. To hold otherwise would be simply to make the employer an insurer of his employee, and this the Legislature has not as yet done."

Both *Collins, supra,* and *Eldridge, supra,* were followed in *White v. American Society for Prevention of Cruelty,* 191 A.D. 6, 180 N.Y.S. 867 (1920) involving an employee who had contracted an anthrax germ which had ultimately killed him. The claim was held to be non-compensable because of the absence of the requisite proof, and the court again reiterated that the presumption under § 21 of the Act could not be used as a substitute for such proof.

In *McHale v. Sheffield Farms Co.,* 193 A.D. 541, 184 N.Y.S. 576 (1920), an award in favor of a decedent who had fallen from a wagon and struck the back of his head, dying of meningitis, was reversed. The court said:

> "It thus appears, not only that there was no evidence of probative force to support the conclusion that the death resulted from an accident, but that it affirmatively appears that the death was due to disease, which is not shown to have had any relation whatever to any alleged accident. The presumptions declared in § 21 of the Act do not help the claimant. They do not relate to the fundamental question of the happening of the accident, which is in the nature of a jurisdictional fact to be supported by direct or circumstantial evidence, and the presumptions do not prevail over 'substantial evidence to the contrary'."

The same requirement of proving an accident and the limited role of § 21 of the New York Act was reaffirmed by the New

York Court of Appeals in *Lorchitsky v. Gotham Folding Box Co.*, 230 N.Y. 8, 128 N.E. 899 (1920). Later that year in the context of a case involving a custodian who was discovered lying about 50 feet from the employer's premises within an hour after he finished work, the presumption was again discussed as follows:

> "No broom was found upon the street to indicate that he had been engaged in sweeping the sidewalk at the time of the accident. As no other of his known duties would have called him to work outside the stable, no fact appears from which it could justly be inferred that the deceased was in the course of his employment when injured. Nor is the claim assisted in this respect by any presumption given by § 21 of the Workmen's Compensation Law. . . . We might have held otherwise were it not for the recent decision of the Court of Appeals in *Eldridge v. Endicott Johnson & Co.*, 228 N.Y. 21, 126 N.E. 254. That case is clear authority to the effect that all the elements of an accidental injury arising out of and in the course of an employment must be shown to exist by common-law proof, independently of the statutory presumption before a claim may be allowed. . . ." *Russo v. Jarvis Stores*, 193 A.D. 587, 588, 185 N.Y.S. 281, 282 (1920).

In *Joseph v. United Kimono Co.*, 194 A.D. 568, 569, 185 N.Y.S. 700, 701 (1921), an employee continued working on the ninth floor of a factory building despite complaints of pains in his head, and his body was eventually found lying on the sidewalk directly below a window on that floor. In reversing the widow's award, the court stated:

> "It having become firmly established that the occurrence of accidents causing compensable injuries may never be presumed, but must always be proven, the sole question here arising is whether the known facts of the case permitted the inference drawn by the

> Commission that the deceased came to his death from an accident attributable to his employment. . . ."

Later that same year, in conjunction with a claimed left eye injury as a result of dust particles, the court in *Pinto v. Chelsea Fibermills,* 196 A.D. 23, 186 N.Y.S. 748 (1921), remarked:

> "The rule is now established that all elements of an accidental injury arising out of and in the course of an employment must be shown to exist by common law proof before there is power in the Commission to make an award. § 21 of the Workmen's Compensation Law raises a presumptono that 'in the absence of substantial evidence to the contrary (a) that the claim comes within the provisions of this chapter', but this does not raise a presumption that an accident has happened because someone makes a claim for compensation. That is a fact jurisdictional in character, and it must be established by evidence."

In *Greenberg v. Greenberg,* 203 A.D. 343, 196 N.Y.S. 626 (1922), the court again noted:

> "The determination of the question as to whether the accident to the deceased arose out of his employment is jurisdictional in character and must be proved by direct or circumstantial evidence, unaided by the presumptions set forth in § 21 of the Workmen's Compensation Law."

This then was the state of the presumption under New York law at the time Congressional legislative hearings were held and when the Longshoremen's Act was enacted in 1927. Thus, in determining the Congressional intent, resort should be had to these New York authorities, for as the House report stated:

> "The bill follows in the main the New York State Compensation Law, which is considered one of the best owing to the fact it was drafted after most careful investigation by experts and others, and it has been

tion wherein jurisdictional coverage was to be presumed, in the absence of substantial evidence to the contrary, was what Congress had in mind. This view comports with the Supreme Court decisions which have had occasion to discuss the § 20 presumption.

In the case of *Davis v. Department of Labor of Washington,* 317 U.S. 249 (1942), a worker was drowned while in the performance of his employer's contract to dismantle a drawbridge, and the Supreme Court was called upon to determine whether or not the State of Washington's Workmen's Compensation Act had constitutionally permissible jurisdiction so as to entertain the death claim. In the course of the Court's opinion, Mr. Justice Black traced the history of the Federal versus state jurisdictional dilemma:

> "There is, in light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent, who are, as a matter of actual administration, in fact protected under the state compensation act.
>
> "Faced with this factual problem we must give great — indeed, presumptive — weight to the conclusions of the appropriate federal authorities and to the state statutes themselves. Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact-finding, determination, and award, our task proves easy.
>
> "There we are aided by the provision of the Federal Act, 33 U.S.C.A. § 920, which provides that in proceedings under the Act, jurisdiction is to be 'presumed in the absence of substantial evidence to the contrary'. Fact-findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is

> therefore entitled to great weight and will be rejected only in cases of apparent error. It was under these circumstances that we sustained the Commissioner's findings in *Parker v. Motor Boat Sales, Supra.*"

The Court then held that the Washington State Compensation statute was not unconstitutional.

The § 20(a) presumption was next addressed in the case of *Cardillo v. Liberty Mutual Insurance Co.,* 330 U.S. 469 (1947). Death benefits under the District of Columbia Workmen's Compensation Act were awarded in the face of employer contentions that the District of Columbia Deputy Commissioner did not have jurisdiction of the claim and that the death did not arise out of and in the course of employment. Jurisdiction was contended to exist solely with the Virginia Industrial Commission since the injury had occurred in that state.

The evidence showed that while the worker was in the process of returning from his job at the Quantico Marine Base to his home in the District of Columbia, a stone struck his automobile's windshield and killed him. In disposing of the employer's jurisdictional contention, the Court stated as follows:

> "We are aided here, of course, by the provision of § 20 of the Longshoremen's Act that in proceedings under that Act, jurisdiction is to be 'presumed in the absence of substantial evidence to the contrary' — a provision which applies with equal force to proceedings under the District of Columbia Act. And the Deputy Commissioner's findings as to jurisdiction are entitled to great weight and will be rejected only where there is apparent error. *Davis v. Department of Labor Industries.,* 317 U.S. 249, 256, 257, 87 L.Ed. 246, 250, 251, 53 S.Ct. 225. His conclusion that jurisdiction exists in this case is supported both by the statutory provisions and by the evidence in the record.

> "The jurisdiction by the Deputy Commissioner to consider the claim in this case rests upon the statement in the District of Columbia Act that it 'shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia and the term "employee" shall be held to mean every employee of every such person'." (330 U.S. 474)

The final Supreme Court decision specifically discussing the § 20(a) presumption was *O'Keeffe v. Smith, Hinchman & Grylls Associates,* 380 U.S. 359 (1965). There an employee who was working for an engineering company in South Korea on a 365 day basis drowned while boating on a lake there. In determining whether or not the decedent's work activity was within the coverage of the Act, the Court invoked the presumption and held that if the conditions of employment operated to create a zone of special danger out of which the injury arose, then the employee's work activities were within the ambit of employment and hence covered by the Act.

The Supreme Court has never stated that the presumption found in § 20(a) of the Act is a presumption of compensability, nor has it ever held that there is a presumption of injury. In fact, the statute itself does not state that it is presumed that the *injury* comes within the provisions of the statute nor that the *accident* comes within the provisions of the statute. Rather it simply states that the claim comes within the provisions of the chapter. If it had been the intent of Congress to relieve a claimant of the burden of establishing that his injury was work related or that it was to be presumed that his accident arose out of and in the course of his employment, then Congress would have so stated.

When one views the New York Act at the time Congress lifted these presumptions from it in 1927, how that Act had been in-

terpreted by the New York courts, the thrust of the hearings and testimony as contained in the legislative history, and this Court's continued recognition, as espoused in the foregoing authorities, that the presumption, with the attributes of liberal construction and beneficent purposes, is designed to extend jurisdictional coverage to the longshore industry, it is respectfully submitted that there is no sound legal predicate for concluding that the presumption is one of compensability and injury

II.

CONFLICT WITH DECISIONS FROM OTHER FEDERAL CIRCUITS

Despite the clear Supreme Court precedent limiting the application of the § 20(a) presumption to the question of jurisdictional coverage, all federal appellate courts who have considered this presumption have extended its application to questions of fact will beyond the concept of jurisdictional coverage, at one time or another, with varying interpretations.

The Second Circuit's most recent pronouncement in *Overseas African Construction Corp. v. McMullen,* 500 F.2d 1291 (2d Cir. 1974), returned to the Supreme Court supported view that the presumption contained in § 20 is a presumption of jurisdiction. In earlier cases within that circuit, however, courts had held that the presumption applied to supply the nexus between an accident and the claimant's employment. In *Turner v. Willard,* 155 F.Supp. 352 (D.N.Y. 1956), the court stated:

> "Accordingly, if disability arises in the course of employment, it must be presumed to have arisen therefrom unless there is substantial evidence to the contrary."

The *Turner* formulation of the presumption was adopted in *Nardi v. Willard,* 156 F.Supp. 425 (D.N.Y. 1957), and *John W. McGrath Corp. v. Hughes,* 264 F.2d 314 (2d Cir. 1959), *cert. denied,* 360 U.S. 931 (1959), although that Circuit had earlier

concluded that ". . . the burden to show that the accident was a contributing cause of the death is on the appellee [the claimant]." *Gooding v. Willard,* 209 F.2d 913 (2d Cir. 1954).

The Third Circuit's extension of the presumption in *Marra Brothers v. Cardillo,* 154 F.2d 357, 359 (3d Cir. 1946), was:

> "The language of the section [Section 20(a)] was designed to meet just such fact situations as the one presently before us. We concluded that if it be proved as here that the decedent was employed as a longshoreman and that he met his death in or about a vessel on the navigable waters of the United States and that nothing more is shown, the deputy commissioner must hold that his widow's claim is within the purview of the statute."

In *Marra,* the presumption was applied to establish that the longshoreman's death arose out of and in the course of his employment rather than being due to foul play.

The Fourth Circuit's presumption approach was first outlined in *Furlong v. O'Hearne,* 144 F.Supp. 266 (D.Md. 1956), *aff'd.,* 240 F.2d 958 (4th Cir. 1957), where the Court held that the § 20(a) presumption did not relieve the claimant of the necessity of proving an accidental injury. This was followed in *Sykes v. O'Hearne,* 181 F.Supp. 368 (D.Md. 1960). In *Beasley v. O'Hearne,* 250 F.Supp. 49 (D.Va. 1966), however, the presumption was utilized only to determine the coverage question of whether the injury occurred on navigable waters or on dry land.

More recently in *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP,* 583 F.2d 1273 (4th Cir. 1978), *cert. denied,* 440 U.S. 915 (1979), the Fourth Circuit utilized the § 20(a) presumption to conclude that the claimant's emphysema arose out of his employment rather than merely being coincidental thereto.

In the Fifth Circuit, the early cases placed the burden on the claimant of proving that his physical condition was job-related.

Pate Stevedoring Co. v. Henderson, 44 F.Supp. 12 (D.Ala. 1943); *Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied,* 372 U.S. 954 (1963); *Young & Co. v. Shea,* 397 F.2d 185 (5th Cir. 1968), *cert. denied,* 395 U.S. 920 (1969).

The recent opinion in *Eller & Co. v. Golden,* 620 F.2d 71 (5th Cir. 1980), though, has now cast the foregoing into doubt for there the court applied the § 20(a) presumption to the question of whether the worker's subsequently developed infirmities were related to his on-the-job accident. Thus it apparently extended the presumption to a question of causal relationship.

The Seventh Circuit follows the traditional pattern of departure from Supreme Court precedent. In its earliest consideration in *Eschbach v. Contractors, Pacific Naval Airbases,* 181 F.2d 860 (7th Cir. 1950), the Court stated:

> "In the hearing before the deputy commissioner, the burden was on the claimant to prove the facts necessary to sustain his claim other than those facts which § 20 of the Act, 33 U.S.C.A. § 920, provides shall be presumed unless there is substantial evidence to the contrary. The fact as to the causal connection between the employment and the injury is not one which is to be so presumed. The burden was, therefore, on the plaintiff to prove such fact."

In the later case of *Continental Insurance Co. v. Byrne,* 471 F.2d 257 (7th Cir. 1972), *cert. denied,* 406 U.S. 918 (1972), the Court extended the presumption by holding that where there was a doubtful factual question as to whether an injury arose out of and in the course of employment, compensability was presumed.

In the Eighth Circuit case of *Ridgley v. Ceres, Inc.,* 594 F.2d 1175 (8th Cir. 1979), in the context of an admitted on-the-job injury, the presumption was applied to relate a subsequent disabling condition to that accident.

Similarly, in the Ninth Circuit case of *Parsons Corp. v. Director OWCP,* 619 F.2d 38 (1980), the presumption was held applicable to the question of a causal relationship between the claimant's employment and a disabling eye condition, thereby casting into doubt its earlier holdings that the § 20(a) presumption applied to coverage only. *Liberty Mutual Ins. Co. v. Gray,* 137 F.2d 926 (9th Cir. 1943); *Pillsbury v. Liberty Mutual Ins. Co.,* 143 F.2d 807 (9th Cir. 1944); and *O'Leary v. Puget Sound Bridge & Dry Dock Co.,* 349 F.2d 571 (9th Cir. 1965).

The District of Columbia Circuit, even before the present case, adopted views of the § 20(a) presumption which are substantially beyond Supreme Court precedent. In *Hartford Accident & Indemnity Co. v. Cardillo,* 72 U.S. App. D.C. 52 (1940), *cert. denied,* 310 U.S. 649 (1940), the Court held that when an injury occurs during the course of that employment, then the presumption arises that the injury also arose out of employment. Since then that Circuit has on numerous occasions held that when an injury manifest itself during employment, the presumption arises that it arose therefrom. *Travelers Insurance Co. v. Cardillo,* 78 U.S. App. D.C. 255, 140 F.2d 10 (1943); *Robinson v. Bradshaw,* 92 U.S. App. D.C. 216, 206 F.2d 435 (1953), *cert. denied,* 346 U.S. 899 (1953); *Butler v. District Parking Management Co.,* 124 U.S. App. D.C. 195, 363 F.2d. 682 (1966); *Wheatley v. Adler,* 132 U.S. App. D.C. 177, 407 F.2d 307 (1968); *Mitchell v. Woodworth,* 146 U.S. App. D.C. 21, 449 F.2d 1097 (1971).

The District of Columbia Circuit expanded the presumption even further to assist a claimant in establishing whether a subsequently manifested disabling condition arose out of an earlier employment-related injury. *J.V. Vozzolo, Inc. v. Britton,* 126 U.S. App. D.C. 259, 377 F.2d 144 (1967) (whether a second myocardial infarction was related to an earlier job-related heart attack); *Swinton v. J. Frank Kelly, Inc.,* 554 F.2d 1075 (D.C. Cir.), *cert. denied,* 429 U.S. 820 (1976) (whether a back problem which became disabling 11 months later was related to a fall from a truck).

From the foregoing, with the possible exception of the current Second Circuit position, it can be seen that each of the Circuits which has considered the scope of the § 20(a) presumption has erroneously extended it beyond the purpose for which it was intended: to decide questionable cases of jurisdictional coverage. Prior to the instant case, these extensions essentially served to establish the nexus between the accident and the employment or to establish the nexus between the subsequently manifested injury and an accident which was previously established to be employment-related.

Now here we see an even more drastic departure from Supreme Court precedent and Congressional intent by the current holding that no accident need be established nor need any job relationship be shown. All that a worker must do is show that he has a physical ailment, and the burden shifts to the employer to prove a negative: that the malady is not work-related.

The Court's opinion so states:

> "We now hold expressly that where a claimant has been injured, the Act requires that, in the absence of substantial evidence to the contrary, the claimant be given the benefit of a rebuttable presumption that the injury arose out of and in the course of the claimant's employment" 200 U.S. App. D.C. 402, 406, 627 F.2d 455, 459 (1980).

In reaching that conclusion, the Court bootstraps that concept by relying primarily on *Butler v. District Parking Management,* 124 U.S. App. D.C. 195, 363 F.2d 682 (1966); *Wheatley v. Adler,* 132 U.S. App. D.C. 177 407 F.2d 307 (1968); and *Mitchell v. Woodworth,* 146 U.S. App. D.C. 21, 449 F.2d 1097 (1971). Those cases, however, do not support the Court's position.

In each of the three cited cases, the claimant's injury arose during work hours on the employer's premises. In addition, each claimant presented evidence in the form of expert medical

testimony that the conditions from which they were suffering were related to their job. Only then was the § 20(a) presumption indulged in by the Court.

They represent, therefore, the type of presumption extension used to establish that an injury manifesting itself during work hours likewise arose in the course of the claimant's employment, but they in no way, even if correctly decided, justify the elimination of the requirement that the claimant show a causal relation to employment by demonstrating that the conditions of employment contributed to the subsequently manifested disability or that the injury first manifest itself during employment hours. The *Riley* decision, consequently, constitutes a major deviation from all previous extensions of the § 20(a) presumption, which themselves ignored the very limited purpose for which the presumption was written: jurisdictional coverage.

The recent trend away from that fundamental concept by the other circuits coupled with the Districts of Columbia's further ground breaking should be halted by this Honorable Court with a return to the original purpose for which the presumption was passed. It should not be forgotten that the presumption in § 20(a) of the Act remains intact today as originally legislated so that it has not changed — only those who continue to construe it continue to change it.

III

EXPANSION OF THE § 20(a) PRESUMPTION WOULD ADVERSELY AFFECT THE ORDERLY ADMINISTRATION OF THE ACT

The expansion of the role of the § 20(a) presumption, as suggested by the Court of Appeals in this case, is repugnant to the orderly administration of the Act and is likely to result in a significant alteration of the current claims procedure. In order to bring the full impact of this radical departure into focus, it is necessary to examine it in conjunction with the full panoply of a claimant's safeguards which are built into the Act. When this is done, it becomes apparent that the combination of these safeguards and the newly defined role of the presumption would effectively serve to deprive employers of the practical ability to defeat meritless claims.

Pro-claimant principles utilized under the Act include a liberal construction to achieve "its humanitarian nature" and "beneficent purposes," *O'Keeffe v. Smith, Hinchman & Grylls Assoc., Inc.*, 380 U.S. 359, 362 (1965); *Friend v. Britton*, 220 F.2d 820 (D.C. Cir.), *cert. denied*, 350 U.S. 836 (1955), with the further benefit that all factual doubts are to be resolved in the injured worker's favor. *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969); *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408 (1932).

Relaxed provisions and interpretations for 30 days written notice of injury to the employer under § 12 of the Act, (including the excusing of a failure in that regard) exist, *Voris v. Eikel*, 346 U.S. 328 (1953); *Hoage v. Employers Liability Assur. Corp.*, 62 U.S. App. D.C. 77, 64 F.2d 715 (1953), *cert. denied*, 290 U.S. 637 (1934), as do statute of limitations requirements purportedly requiring the filing of a claim within one year after the injury in § 13 of the Act. *Intercounty Const. Corp. v. Walter*, 422 U.S. 1 (1975); *Great American Indemnity Co. v. Britton*, 86 U.S. App. D.C. 44, 179 F.2d 60 (1949); *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117 (5th Cir. 1980).

Together, these provisions give greater latitude to claimants the more tenuous the nature of the relationship is between an injury and employment. This results in not only protecting good faith employees whose work-related injuries are questionable, but it also can serve to promote groundless claims in which the relationship to employment is wholly lacking.

Once a compensation claim is actually filed, there is no way for an employer or carrier to defeat it on a summary basis or by any means short of a formal hearing before an Administrative Law Judge. 33 U.S.C. §§ 919(c) and (d). If a claimant does not appear at the formal hearing, there is no ability to obtain a dismissal for failure to prosecute. Thus, not only may a stale claim be viable many years after it arose due to the interplay among §§ 12, 13 and 30 of the Act, but a claimant is protected against having his claim dismissed by his own inaction once it has been filed.

Once a claimant reaches the formal hearing stage, he receives the previously cited judicial benefits that the Act is to be construed liberally and that all doubts are to be resolved in his favor. This policy has been significantly enhanced by another recent errant decision from the District of Columbia Circuit in *Hensley v. Washington Metropolitan Area Transit Authority*, ____ U.S. App. D.C. ____, ____ F.2d ____ (D.C. Cir. No. 79-2552, March 17, 1981), which held that the opinion of a claimant's treating physician [whom he has the unrestrained ability to choose] is to be accorded greater weight in opinions concerning causality than that of an independent medical examiner retained by the employer, even though the latter doctor was credited by the Administrative Law Judge. Another illustration of pro-claimant proclivity by the D.C. Circuit required the employer to come forward with affirmative evidence rather than evidence of a "negative character" to rebut the presumption. *Swinton v. Kelly*, 554 F.2d 1075. 1082 (D.C. Cir.), *cert. denied.* 429 U.S. 820 (1976).

These statutory and judicial pronouncements favoring claimants are buttressed by the fact that a claimant faces no

economic risk in pursuing his claim since his attorney's fees are paid by the employer and carrier if he is successful, and should he somehow lose, he is not obligated to pay any attorney's fee. 33 U.S.C.§ 928.

The net result of the foregoing is that it is virtually impossible for an employee to lose a justified claim, and indeed there are recoveries as well on questionable claims due to the "humanitarian" goal that no valid claim should be denied. The combination of these individual policies, however, with the newly fashioned *Riley* presumption expansion that any medical condition is causally related to an individual's employment in the absence of substantial evidence to the contrary, can only lead to an administrative and judicial distortion of the Act which is absurd in practical application and fundamentally unfair to the employer and carrier.

If the present Court of Appeals ruling is upheld, all the employee need do to assert a cognizable claim is merely to state that he was employed and that he suffers from a medical condition. He need not even have a reasonable belief that the ailment is work-related, nor would a specific event be necessary, and the filing of such a claim could be readily justified on the basis that he wishes to put the employer to its burden of proof. The employer and carrier would then have to establish by substantial evidence that the medical condition was not in any way due to the worker's employment, an onerous and in many cases an insurmountable barrier depending upon the nature of the malady involved.

The practical effect of adopting such a universal presumption of causality for all medical conditions would be to cause a disruption of the orderly administration of the Act, particularly in view of the Act's claimant orientation. Because it costs the employee nothing to file a claim, the filing of countless frivolous claims will be encouraged because of the potential that substantial benefits may be secured due to the failure of the employer to meet a stringent burden of proof, or perhaps the carrier will succumb and settle the case rather than incur the

significant expenses of proceeding to a formal hearing where hearing costs, defense costs and claimant's counsel's fees, if an award is made, loom large.

The expansion of the § 20(a) presumption will also surely result in the Office of Workers' Compensation Programs (OWCP) becoming a forum for health insurance claims wherein the employers and carriers have the option to either pay dubious or non-meritorious claims or incur substantial expenses in obtaining legal, investigative and medical assistance to demonstrate the claim's invalidity. The increase in personnel and resources required by OWCP to process the resultant multitude of claims filed where the employee need not even have a good faith belief that his condition is work related would necessarily be extensive.

Since meritorious claims already enjoy the substantial safeguards previously alluded to, the only type of claim which would be encouraged by interpretation of the presumption in this manner are the marginal ones, plus those which may be fraudulently contrived. It will be the benefit of claimants to conveniently forget non-work related occurrences which might have been responsible for the malady. The instant case, in fact, provides a particularly appropriate example of the fundamental unfairness promoted by such a situation, for here the ALJ expressly found that the claimant gave false testimony as to the happening of the accident allegedly responsible for the injury. Indeed, he even secured the services of a co-worker in his scheme. See Tomlinson, *Workers' Compensation – A License to Steal?* 109 Readers Digest No. 6544, p. 163 (1976); Ahern, *The New Crachdown on Insurance Frauds*, 38 Journal of Insurance No. 4, p. 26 (1977).

The attractiveness of workers' compensation benefits in the District of Columbia is well known among the work force and has been well publicized, for the benefits which equal 2/3 of a worker's average weekly wage are tax free. (E.g. Washington Post, March 9, 1980, page A-1; Wall Street Journal, May 21, 1981, page 26, Appendix A.) Even without expansion of the statutory

presumption, the cost and impact of workers' compensation in the District of Columbia is profound. See, Statement from the American Insurance Association, Appendix B.

For example, the Washington Metropolitan Area Transit Authority (WMATA) has a self-insurance program for its non-construction operations. Its claim cost since fiscal year 1975 rose from $1.6 million to a projected $9.2 million in fiscal year 1980. Out of 6,000 unionized WMATA employees, 2,900 claims are pending. Although WMATA has tried to promote a program designed to reduce claims by awarding prizes to employees not to file, it estimates that three out of five union employees will file for and win benefits in fiscal year 1981. 126 Congressional Record, February 7, 1980, H 746.

Where workers' compensation benefits are currently so attractive that there is a high frequency of claims even when the employee bears the burden of showing a causal relationship between his medical condition and his employment, it can be reasonably seen that elimination of that requirement will certainly open the floodgates for the filing of thousands and thousands of dubious or non-meritorious claims. When you couple the already lenient notice and timely claim filing interpretations under the Act with the Court of Appeals invitation to file, one becomes concerned not only with future claims but also those lurking in the past going back many years that can now be attempted with no need to either have a belief that the problem was work related or a doctor's opinion supporting same.

The Court of Appeals ruling here also serves to change fundamental burden of proof concepts. First of all, it is directly contrary to the provisions of the Administrative Procedure Act which governs these proceedings. 5 U.S.C. § 556; 33 U.S.C. § 919(d). Secondly, presumptions have been justified because one party has greater access to evidence on a particular issue and is, therefore, the logical one to come forward with it. *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978); *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968), *cert. denied* 395 U.S. 920 (1969).

Yet where a worker suffers from a physical infirmity which does not logically or obviously emanate from his work, he is the party with the greatest access to evidence concerning the origin of the malady. He is the only one aware of the particulars of his daily employment activities and his personal life. He is the only party with knowledge of and immediate access to his entire medical history. In particular, he also has far greater access to his family, friends, and associates in aiding his recollection as to possible causative agents.

To require an employer to explain an idiopathic medical condition where the employer has no knowledge of an employee's personal or medical history is completely repugnant to the concept of allocating the burden of proof to the party with superior access to the information. Furthermore, the effect of the Court of Appeals ruling below requires not only that an employer demonstrate the non-relation of a medical condition to any particular incident advanced by the claimant as causative, but also that the employer must rule out *any* employment related incident and the working environment as either causing or aggravating the medical condition.

To properly meet such a burden, it would be necessary for the employer to prove a negative fact and to rule out each individual employment activity ever engaged in by the claimant to sever the employment connection. Yet the courts are loathe to require the worker to prove a negative such as that he cannot engage in any form of employment. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP,* 592 F.2d 762 (4th Cir. 1979).

Not only would the administration of the Act and the conduct of formal hearings be substantially affected by the new distortion of the presumption, but the effect upon the insurance industry and the business community would likely be devastating Even at the present time, claims expense under the Act to insurers is high, for they must not only pay compensation benefits and medical expenses, but they must also employee intra-office personnel to handle compensation.

Although this concededly is a routine expense of doing business, under the Act the insurer must employ investigators,

defense attorneys, plus medical and vocational rehabilitation experts to properly evaluate and defend controverted claims. Furthermore, if the insurer defends a claim where the claimant prevails on *any* issue, aside from the cost of going to trial, it is also obligated to pay claimant's attorney's fees and expenses, including expert witness fees. 33 U.S.C. § 928.

The District of Columbia workers' compensation law has become notorious for its high costs and these continue to escalate. As of January 1, 1978, for various types of business, District of Columbia workers' compensation insurance premium rates varied from 127% to 431% of their Maryland and Virginia counterparts. From 1973 to 1979, workers' compensation insurance premiums in the District of Columbia have increased in excess of 600%. 126 Congressional Record, February 7, 1980 (H. 745). See also statement from the American Insurance Association, Appendix B. A similar result has occurred to shippers, forcing many to become self-insured. Wall Street Journal, May 21, 1981, page 26, (Appendix A.)

In testimony before the District of Columbia City Council's Committee on Housing and Economic Development, exploring the need for a new Workers' Compensation Act in the District of Columbia, Knox Banner, Executive Director of the Mayor's Office of Business and Economic Development, concluded that from 1970 to 1976, the District lost 108 firms and approximately 15,000 jobs, an estimated loss of $180 million in payroll per year. Mr. Banner stated:

> "One of the most frequently cited disincentives that is presently discouraging business development in the city is the current workers' compensation law . . . as a result of changes in the Act in 1972, District workers now enjoy unnecessarily high compensation benefits, and employers pay unnecessarily high premiums. 126 Congressional Record, February 7, 1980 (H 745)."

The local committee's report found that expenses attendant to procuring workmens' compensation insurance had made many local businesses non-competitive and forced them to leave the

city, plus it had deterred new businesses from locating in it. (Report, Committee on Housing and Economic Development on Bill 3-106, the District of Columbia Workers' Compensation Act of 1979, January 8, 1980, pp. 3, 4.) Difficulties experienced by private employers in the District of Columbia in obtaining voluntary workers' compensation insurance from individual insurance companies were also noted, and statistics from the District of Columbia Department of Insurance reported that in 1975, 568 private employers were insured by the assigned risk pool, whereas by 1978, the number had grown to 24,000. (Committee Report, *supra,* p. 5).

The current high cost to insurers of administering the Longshore Act in the District of Columbia thus demonstrates the already precarious position which employers and insurers are in. With the introduction of additional anticipated claims stemming from the Court of Appeals invitation, this would interpose further burden on an already strained business community and insurance industry.

Since all individuals at some time in their lives experience some need for medical treatment, and may even lose time from work, the potential number of claims in this category is astronomical. In light of the reversed burden of proof concerning an illness and employment, what is to prevent claims being advanced for payment of medical bills or weekly benefits for the common cold, the flu, old age arthritis, indigestion, gout, or any other garden variety medical problem? The § 20(a) presumption, as construed by the *Riley* Court of Appeals, effectively engrafts a health insurance claims rider on a workers' compensation policy contrary to all rhyme, reason, or logic. If we are to have health insurance for workers across the board, then the law should be changed by Congress – not by judicially reading words out of or into a statute at loggerheads with its express terms and prior Supreme Court precedent.

CONCLUSION

For the reasons set forth above, Amicus respectfully urges this Honorable Court to vacate the Court of Appeals' application of the § 20(a) presumption to the facts of this case. The presumption should properly be limited to the issue of jurisdictional coverage, as contemplated by Congress in enacting the Longshoremen's and Harbor Workers' Compensation Act, and as it has been consistently viewed by the Supreme Court.

/s/ JOHN C. DUNCAN, III
Suite 1010
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
202/872-8411

Attorneys for Amicus Curiae

WILLIAM P. DALE
KURT C. ROMMEL
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

APPENDIX A

Wall Street Journal, May 21, 1981, page 26

LONGSHORE LARGESS

Efforts by the Reagan administration to thresh out a trade policy are being accompanied by the usual warnings about declining U.S. competitiveness abroad. All sorts of presumed problems have been identified, including the prohibition against U.S. companies paying baksheesh.

While we might view some of these claims with skepticism, there is one trade problem that hardly anyone has talked about that is much in need of fixing. A little piece of legislation called the Longshoremen's and Harbor Workers' Compensation Act is making it ever more costly to ship from U.S. ports, thus pricing U.S. companies out of export markets.

The act was passed in 1927 to provide compensation for maritime workers injured on the job but not eligible for state compensation. A fine idea. But since its humble beginnings, the act has been puffed up through judicial rulings and congressional amendments until it now inflicts on affected employers, hands down, the most expensive workman's compensation program in the country.

The law now covers over a million people—not just longshore and harbor workers, either, but those working in shipyards, the pleasure boat industry, summer camps, marinas and even marine museums, among others. And what lucky workers they are.

Consider the following: Workers injured on the job are entitled to 2/3 of their gross wages, up to 200% of national average weekly wages, tax-free. The tax-free goody means of course, that many workers can take home benefit checks which are larger than their regular working wage. And these benefits, once

begun, continue, if the injury is "permanent," if the injured person goes on strike, goes to jail or even goes back to work at full pay. Not bad for starters.

Consider further: Say a hapless worker is hugged to death by a grizzly while hiking through Yellowstone. The surviving spouse collects death benefits until age 70 or remarriage, even though the death was unrelated to work. Payments in both disability and death categories have unlimited cost-of-living adjustments.

The disability itself is diagnosed by a physician of the worker's own choosing—a cozy situation whch can lead to unsavory union practices. A 1976 investigation by the New York Waterfront Commission found that the Longshoremen' Association was shaking down employers by threatening them with avalanches of phony disability claims. Companies either paid up or went under—under a pile of claims.

Skyrocketing benefits have meant skyrocketing expenses. In fact, over the past decade, costs to employers have gone up six times faster than wages. For some shipped items, the cost of handling can add 25% to the wholesale price. The entire arrangement has become so expensive and unpredictable that many insurance companies have simply stopped writing longshore compensation policies. In fact, over the past 10 years, the nation's 16 largest shipyards have all been forced to become self-insured.

Those companies who have passed insurance costs through to clients have found that clients take their business elsewhere—over the border to Mexico or Canada. And why not? Canadian costs, for instance, run about 5 cents per $100 of payroll; in New York, companies pay up to $87 per $100 of payroll.

The Department of Commerce estimates that in 1979 over a billion dollars of U.S. goods were exported via Canada instead of U.S. ports. Thus, as shipping business is diverted to other ports and stevedoring companies fold, there are fewer and fewer shipyards and fewer and fewer jobs.

Help is on the way, however; last week, Senators Don Nichols and Sam Nunn introduced a bill which places a 3% cap on COLA increases, eliminates job-unrelated death benefits, clarifies and limits jurisdiction and junks the unsupervised choice of physicians.

It looks good to us. On June 9, the Senate Labor subcommittee begins hearings on this bill. We hope it looks as good to them.

APPENDIX B

May 21, 1981

John C. Duncan III
McChesney and Pyne, Chartered
Suite 1010
1000 Connecticut Avenue N.W.
Washington, D.C. 20036

RE: U.S. Industries/Federal Sheet Metal Inc., et.al. vs.
Director, OWCP, et.al.
Supreme Court of the United States

Dear Mr. Duncan:

We gave endeavored to develop statistical information regarding the cost of the compensation system as currently administered under the Longshoremen's and Harbor Workers Compensation Act (LHWCA). Data has been provided to us by the National Council on Compensation Insurance, a nationwide data gathering and rate making organization serving the insurance industry. In the relatively short time available we are unable to obtain complete statistical data, and consequently can make only partial estimates. The data that is available, however, shows the actual indemnity and medical losses for employees covered by LHWCA (including D.C. employees) in a policy period April, 1977 to March, 1978 to be at the very least $162 million.

This figure is considerably understated for the following reasons:

(1) Only 41 states are included in this compilation. Some states with notoriously heavy LHWCA exposure, such as New York, New Jersey and Pennsylvania, maintain their own rating organizations and do not report their experience to the National Council;

(2) Claims filed under Longshore coverages that are incidental to other types of risks are not included in this compilation;

(3) Longshore claims outside the District of Columbia have been provided only on a "first and second reporting" basis, thus excluding claims for losses occurring within the period that are expected to be filed in later years;

(4) The actual number of cases reported is close to 12,000 for the policy period. This figure is also substantially understated because "medical only" cases (i.e., those without claim for time lost from work) are excluded; and

(5) The statistics do not include expenses incurred for claims handling and defense.

As further indication of the enormous cost of the current LHWCA system, statistics from the National Council show the average loss per covered Washington, D.C. (LHWCA) employee was approximately $241. This is over three times the national average of approximately $77 per non LHWCA covered employee.

It would be pure speculation on anyone's part to anticipate what effect a presumption that all ailments are compensable would have on this system. However, such a presumption would clearly provide incentive for filing questionable or frivolous claims, would greatly add to the expense of handling such claims, and in most instances employers or their insurers would be unable to overcome such a presumption and benefits would be payable. Under these circumstances it is not unreasonable to expect an increase of hundreds of millions of dollars annually in the cost of this already demonstrably overburdened system.

Very truly yours,

Patrick J. O'Brien
Counsel

PJO:ad